BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

LOWEN FAMILY LIMITED PARTNERSHIP,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

CASE No. 13-3-0007

ORDER OF DISMISSAL

This matter came before the Board on Respondent City of Seattle's timely motion to dismiss Case No. 13-3-0007, arguing that Petitioner lacks standing to bring a challenge under the GMA or SEPA.[1] Petitioner responds that it has APA standing under RCW 36.70A.280(2) because Petitioner's property rights are allegedly adversely affected by the enactment of Ordinance No. 124172 (the Ordinance) as amended by Amendment 7 (the Amendment) on April 21, 2013.[2] Petitioner argues that the upper-level setback imposed by the Ordinance as amended denies Petitioner the ability to fully realize the 160/85-240 zoning potential otherwise expanded to its property by the Ordinance.[3] Second, Petitioner argues that it has standing under SEPA.[4]

WAC 242-03-555 allows for dispositive motions on a limited record to determine the standing of a petitioner to bring a challenge. A dispositive motion to decide a challenge to compliance with notice and public participation requirements of the GMA may be brought pursuant to WAC 242-03-560, provided that the evidence relevant to the challenge is limited.

[1] City's Dispositive Motion (August 28, 2013) at 15.
[2] Petitioner's Response to City's Dispositive Motion (September 13, 2013) at 20-21.
[3] *Id.* at 19-23.
[4] *Id.* at 23-24.

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For the reasons below, **the Board finds** that Petitioner lacks standing to challenge Seattle's enactment of Ordinance No. 124172 and Case No. 13-3-0007 is dismissed.

A. Motion to Dismiss GMA and APA Claims for Lack of Standing (Issues 1-5 and 7)

GMA standing is set out at RCW 36.70A.280(2), which provides in relevant part:

> A petition may be filed only by: . . . (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; . . . or (d) a person qualified pursuant to [the Administrative Procedures Act, as set out at] RCW 34.05.530.

These two means of obtaining standing are referred to as Participation (or Appearance) standing and APA standing.[5]

It is not disputed that Petitioner failed to participate in the lengthy public process leading up to the enactment of the Ordinance and thus lacks participation standing under the GMA. Pursuant to RCW 36.70A.280(2), Petitioner instead brings a procedural APA claim that the City failed to comply with GMA public notice and participation requirements, asserting standing under RCW 34.05.530.

APA standing is set out at RCW 34.05.530, which reads:

> A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:
> (1) The agency action has prejudiced or is likely to prejudice that person;
> (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

As an owner of property affected by the Ordinance, the Lowen Family Trust has a property interest. Property interests are among the interests that the City was required to

[5] *MacAngus Ranches, et al. v Snohomish County*, CPSGMHB Case No. 99-3-0017, Final Decision and Order (March 23, 2000) at 4.

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consider. The standing question then hinges on whether the City's action has or is likely to prejudice Lowen.

To establish prejudice, Petitioner must allege an "'injury in fact.'"[6] Petitioner's evidentiary burden to show an injury in fact is to show "that the government action will cause him or her 'specific and perceptible harm' and that the injury will be 'immediate, concrete, and specific.'"[7] If the injury is merely conjectural or hypothetical, there can be no standing.[8] Here, Petitioner attempts to distinguish the enacted Ordinance from the Amendment to the Ordinance, claiming that it does not challenge the enacted Ordinance which rezoned its property, merely the Amendment which decreased the amount of upzone that might otherwise have been in the final legislation.[9] The Board is not persuaded. The Amendment was not an agency action within the meaning of the statute, but merely a change to proposed legislation. Proposed legislation may be amended repeatedly during the legislative process, but it is only the City's **official action** in adopting the Ordinance itself that is subject to Board review.[10] If Petitioner means only to challenge the Amendment, the Board would dismiss for lack of jurisdiction under RCW 36.70A.280(1)(a).

Likewise, to the extent that Petitioner requests that the Board find Amendment 7 non-compliant and remand/invalidate the Amendment to the Ordinance, but not the Ordinance itself, Petitioner requests relief that this Board has no authority to grant.[11] The Board believes Petitioner misreads RCW 36.70A.300(3)(b), which states that the Board may:

> Find that the … city is not in compliance …as it relates to the …adoption of plans, development regulations, and amendments thereto ….

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[6] *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992); *Save a Valuable Env't*, 89 Wn.2d at 866; *Concerned Olympia Residents v. Olympia*, 33 Wn. App. 677, 683, 657 P.2d 790 (1983); *Coughlin v. Seattle Sch. Dist. 1*, 27 Wn. App. 888, 621 P.2d 183 (1980).

[7] *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008, Final Decision and Order (October 23, 1995) at 94-95 (citations omitted); *Buckles v. King County*, CPSGMHB Case No. 96-3-0022, Final Decision and Order (November 12, 1996) at 23.

[8] *Rural Bainbridge Island v. City of Bainbridge Island*, CPSGMHB Case No. 98-3-0030c, Order on Dispositive Motions (October 16, 1998) citing *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008, Final Decision and Order (October 23, 1995) at 23; *Trepanier v. Everett*, 64 Wn. App. 380, 382 (1992).

[9] Petitioner's Response to City's Dispositive Motion at 21.

[10] RCW 36.70A.280(1)(a).

[11] Amended Petition for Review at 7.

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The 'amendments' referenced in RCW 36.70A.300(3)(b) are amendments to existing comprehensive plans and development regulations, not amendments to proposed legislation. Thus, there is reason to question whether Petitioner can show that a judgment in his or her favor "would substantially eliminate or redress" that prejudice. RCW 34.05.530(3).[12] Noting that the Petition for Review challenges the adoption of the Ordinance itself,[13] the Board gives Petitioner the benefit of the doubt and proceeds to determine whether the adoption of the Ordinance as amended prejudiced Petitioner.

Prior to the adoption of the Ordinance, Petitioner's property was zoned Industrial Commercial, with a 65-foot height limit.[14] Ordinance No. 124172 as amended rezones the property to Seattle Mixed with a 160-foot non-residential height limit and 85- to 240-foot residential height limit, subject to a 110-foot upper level setback from Mercer Street for tower structures above 85 feet. The net effect, then, of the enacted Ordinance is to increase the height limit from 65 feet to at least 85 feet. The City argues that this upzone did not injure Lowen, but benefited it by increasing the development capacity, and thus the value, of the Lowen property. The Board agrees. In *Chevron*, the court held that Chevron was unable to show how its property rights were actually prejudiced because Chevron continued to use its land in the same manner it did prior to the 2001 plan amendments. Without an actual effect on its property rights, Chevron was unable to show substantial prejudice.[15] See also *MacAngus Ranches*, in which the Board held that Petitioners did not show that the minor changes in allowed uses resulting from the zoning change created an injury in fact.[16] In *MacAngus Ranches*, Petitioners were mainly dissatisfied that the County's action did not change the UCF designation enacted four years prior and, therefore,

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[12] *MacAngus Ranches, et al. v. Snohomish County*, CPSGMHB Case No. 99-3-0017, Final Decision and Order (March 23, 2000) at 5-6.
[13] Amended Petition for Review at 2.
[14] *Id.* at 2.
[15] *Chevron USA v. Central Puget Sound Growth Management Hearings Board*, 156 Wn. 2d 131, 124P.3d 640 (2005)
[16] *MacAngus Ranches, et al. v. Snohomish County*, CPSGMHB Case No. 99-3-0017, Final Decision and Order (March, 23, 2000) at 6.

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Petitioners did not receive a hoped-for benefit.[17] As in *Chevron* and *MacAngus Ranches*, Petitioner Lowen's ability to use its property here is not diminished as a result of the City's action. Instead, as in *MacAngus Ranches*, Petitioner's grievance is that it did not receive as great a benefit from the enacted legislation as Petitioner had hoped for. Petitioner's ability to use its property here is not diminished as a result of the City's action.

The Board finds that Petitioner has not satisfied its burden to show actual injury to itself and so fails to establish APA standing. Without either APA or participation standing, Lowen lacks standing to allege violations of the GMA and **Issues 1-5 pertaining to GMA non-compliance must be dismissed.**

Because the Petitioner does not have standing to bring its APA claim, the Board does not reach the merits of Lowen's procedural allegations (a) that Amendment 7 was outside the scope of what had previously been publicly noticed and commented upon;[18] (b) that the City failed to provide sufficient additional notice and opportunity for comment on the amended proposed Ordinance prior to taking the challenged action;[19] or (c) that, under a

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[17] *Id.* at 7.

[18] RCW 36.70A.035 subsection (1) calls for effective notice of comprehensive plan actions. Subsection (2) requires additional analysis and opportunity for public participation if, subsequent to public hearing, a change to a comprehensive plan is proposed which is outside the scope of what has thus far been publicly noticed and analyzed. However, a proposal may be modified during the course of public debate without necessarily requiring publication of a new notice. See, *e.g.*, *Halmo v. Pierce County*, CPSGMHB Case No. 07-3-0004c, Final Decision and Order (September 28, 2007) at 14-15; *Cave/Cowan v. City of Renton*, CPSGMHB Case No. 07-3-0012, Final Decision and Order (July 30, 2007) at 12-13; *NENA v. City of Everett*, CPSGMHB Case No. 08-3-0005, Final Decision and Order (April 28, 2009) at 16-17. *Burrows* and other Board decisions establish that requirements for effective notice and fair public process do not mandate that the final language of the ordinance be available for public comment before it can be adopted. *Burrows v. Kitsap County*, CPSGMHB Case No. 99-3-0018, Final Decision and Order (Mar. 29, 2000), at 10. See, e.g., *McVittie VI v Snohomish County*, CPSGMHB Case No. 01-3-0002, Order on Motions (October 11, 2001) at 4 ("To clarify, the Board did not intend that the degree of detail of the notice mimic the actual ordinance*"); Pirie v. City of Lynnwood*, CPSGMHB Case No. 06-3-0029, Final Decision and Order (April 9, 2007) at 16 (Petitioner's allegations that notices are deficient "because the notices fail to set forth the full text of any proposed action" are unfounded); *Halmo*, supra, at 14-15 (GMA notice and public participation provisions do not require County Council to provide reasoned explanation of revisions and modifications to amendments.)

[19] If a change to a comprehensive plan amendment is proposed after the public comment period is closed, the city or county must re-notice the matter and allow public review unless one or more statutory exceptions apply. Even for changes after public comment is closed, the GMA provides an exception to re-noticing if "the proposed change is within the scope of the alternatives available for public comment." RCW 36.70A.035(2)(b)(ii).

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Chevron analysis,[20] personal notification of Petitioner was required because the Ordinance specifically targeted the Lowen parcel and deprived their property alone of the ability to fully utilize the expanded height allowances.

B. Motion to Dismiss Petitioner's SEPA Challenge (Issue 6)

It bears repeating that all matters subject to review by the Growth Management Hearings Board must meet the requirements of RCW 36.70A.280(2)(b). In order for an individual to bring a SEPA challenge under the GMA, Petitioner must show participation or APA standing unless certified by the governor.

Participation Requirements under SEPA

The Board first looks to the SEPA regulations to determine the effect of failure to participate in environmental review. WAC 197-11-545(2) indicates the effect of not submitting comments to the lead agency during the SEPA comment period:

> (2) **Other agencies and the public**. Lack of comment by … members of the public on environmental documents, within the time periods specified by these rules, *shall be construed as lack of objection* to the environmental analysis, if the requirements of WAC 197-11-510 [Public Notice] are met. (emphasis added)

"One of SEPA's purposes is to ensure complete disclosure of the environmental consequences of a proposed action before a decision is taken."[21] "Participation and objection to the environmental analysis is therefore a prerequisite to review of agency SEPA compliance."[22]

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[20] *Chevron* relies on two cases to hold that due process requires individual notice when a property owner's land is uniquely targeted by the government and, as a result, the landowner's property rights are actually and significantly affected. Nevertheless, the court held that Chevron was unable to show how its property rights were actually affected because Chevron continued to use its land in the same manner it did prior to the 2001 plan amendments. Without an actual effect on its property rights, Chevron was unable to show substantial prejudice.

[21] *Shoreline III and IV*, CPSGMHB Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Order on Dispositive Motions (January 18, 2010) at 6, citing *Kitsap County v. DNR*, 99 Wn. 2d 386, 391 (1983); *King County v. Boundary Review Board*, 122 Wn.2d at 663.

[22] *Id.,* citing *Citizens v. Mount Vernon*, 133 Wn. 2d 861, 869, 947 P.2d 1208 (1997).

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As explained by the Pollution Control Hearings Board:

> Participation in public hearings, or commenting through the environmental review process are in some circumstances the only administrative remedy available to a party and thus are the forums in which exhaustion of remedies must occur in order for the party to later make a claim. See, *Citizens v. Mount Vernon*, 133 Wn.2d at 869. The very language of WAC 197-11-545(2) that "lack of comment" shall be construed as "lack of objection" to the environmental analysis assumes that **a comment period is part of an available administrative process**[23] that should be utilized by interested members of the public.[24]

It is undisputed that Petitioner did not participate in the ample SEPA comment periods leading up to the adoption of Ordinance No. 124172 provided by the City. Pursuant to WAC 197-11-545(2) such lack of comment "shall be construed as lack of objection to the environmental analysis."[25] Therefore **the Board finds** that the Lowen Family Trust is precluded from raising SEPA issues in this case due to its lack of participation and comment in the SEPA review process.

Injury to Interest Protected by SEPA

Further, the Central Board's long-held position on SEPA standing is based on the statutory provisions in the State Environmental Policy Act which define the basis for appeal of a SEPA determination.[26] RCW 43.21C.075, entitled "Appeals," is the controlling provision in SEPA regarding standing to challenge environmental review.[27] Subsection (4) provides in part:

> …a person aggrieved by an agency action has the right to judicial appeal …

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[23] The Eastern and Western Growth Management Boards have interpreted participation in the SEPA comment process as necessary exhaustion of administrative remedies. See *Shoreline III and IV* at 6.
[24] *Spokane Rock Products, Inc., et al., v. Spokane County Air Pollution Control Authority,* PCHB Case No. 05-127, Order Granting Motion for Summary Judgment (February 13, 2006) at 10. (emphasis added)
[25] WAC 197-11-545(2).
[26] See, e.g., *Davidson Serles, et al. v. City of Kirkland*, CPSGMHB Case No. 09-3-0007c, Order on Motions (June 11, 2009) at 11.
[27] The legislature has the authority to define and restrict standing. *Citizens for Clean Air v. Spokane,* 114 Wn. 2d 20, 29, 785 P.2d 447 (1990). The legislature has imposed standing restrictions in other land use provisions. See for example, the GMA standing provisions at RCW 36.70A.280(2), the Boundary Review Board Statute requirements at RCW 36.93.160(5), or the LUPA standing provisions at RCW 36.70C.060.

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The Washington appellate courts have clarified the meaning of "a person aggrieved," holding that one who seeks judicial review of a SEPA determination must meet a two-part test to establish standing – the Trepanier test[28] – which requires a two-part analysis:

> First, the plaintiff's supposedly endangered interest must be arguably within the zone of interests protected by SEPA. Second, the plaintiff must allege an injury in fact, that is, the plaintiff must present sufficient evidentiary facts to show that the challenged SEPA determination **will cause him or her specific and perceptible harm**. The plaintiff who alleges a threatened injury rather than an existing injury must also show that the injury will be "immediate, concrete, and specific"; a conjectural or hypothetical injury will not confer standing.[29]

First, the interest that the petitioner is seeking to protect must be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[30] Economic interests are not within the zone of interests protected by SEPA.[31] Instead, Petitioner alleges that the height restrictions in the Ordinance will result in less opportunity to provide public amenities such as affordable housing, transportation, and "other elements of the environment that should have been addressed in the FEIS.[32] Arguably, these interests are within the zone of interests protected by SEPA.

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[28] The two-part SEPA standing analysis used by the Central Puget Sound Growth Management Hearings Board since 1995 is based on *Leavitt v. Jefferson County*, 74 Wn. App. 668, 678, 875 P.2d 681 (1994) and *Trepanier v. Everett*, 64 Wn. App 380, 382-83, 824 P. 2d 524, review denied, 119 Wn.2d 1012 (1992). See, e.g., *Hensley VI v. Snohomish County*, CPSGMHB Case No. 03-3-0009c, Order on Motions (May 19, 2003) at 9-10; *Rural Bainbridge Island v. City of Bainbridge Island*, CPSGMHB Case No. 98-3-0030c, Order on Dispositive Motions (October 16, 1998) at 4; *HEAL v. City of Seattle*, CPSGMHB Case No. 96-3-0012, Final Decision and Order (August 21, 1996) at 9.

[29] *Master Builders and Brink, et al. v. Pierce County*, CPSGMHB Case No. 02-3-0010, Order on Motion to Dismiss SEPA Claims (October 21, 2002) at 2. (emphasis added)

[30] *Trepanier* at 383 citing *Save a Valuable Env't v. Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970)).

[31] RCW 43.21C.010; .20; *County Alliance v. Snohomish County,* 76 Wn. App. 44, 54, 882 P.2d 807 (1994) citing *Concerned Olympia Residents for Env't v. Olympia*, 33 Wn. App. 677, 682, 657 P.2d 790 (1983).

[32] Petitioner's Response to City's Dispositive Motion at 24.

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Second, the petitioner must allege an "'injury in fact,'" *i.e.*, that he or she will be "specifically and perceptibly harmed" by the proposed action.[33] Further, when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself.[34] If the injury is merely conjectural or hypothetical, there can be no standing.[35] As with the economic interests alleged by the Petitioner evaluated supra, the SEPA interests alleged here are not actual losses of present value, but potential losses from what might have been but never was. Such injury is the definition of hypothetical and certainly not immediate, concrete or specific. Neither does the potential harm alleged by the petitioner – *i.e.*, less opportunity to provide public amenities such as affordable housing, transportation, and "other elements of the environment that should have been addressed in the FEIS – seem personal to the petitioner but rather a vague potential harm to society at large. **The Board finds** that the Petitioner has not carried its burden to show actual prejudice to its own SEPA-protected interests.

The Board finds that the Petitioner has not carried its burden of demonstrating standing to challenge the Ordinance under RCW 43.21C.075 and Issue 6 is dismissed.

In the absence of standing to challenge the City's action under the GMA or SEPA, there can be no finding of non-compliance and hence no basis for invalidity. Issue 7 is dismissed.

CONCLUSION

Based on review of the GMA, SEPA, the Board's rules of practice and procedure and prior case law, the briefs and evidence submitted, and having deliberated on the matter, the Board **grants** the City of Seattle's motion[36] to dismiss Petitioner's entire petition due to Petitioner's failure to establish GMA or SEPA standing.

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[33] *Trepanier* at 383 citing *Save a Valuable Env't*, 89 Wn.2d at 866; *Concerned Olympia Residents v. Olympia*, 33 Wn. App. 677, 683, 657 P.2d 790 (1983); *Coughlin v. Seattle Sch. Dist. 1*, 27 Wn. App. 888, 621 P.2d 183 (1980).
[34] *Id.,* citing *Roshan v. Smith*, 615 F. Supp. 901, 905 (D.D.C. 1985).
[35] *Id.,* citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89, 37 L. Ed. 2d 254, 93 S. Ct. 2405 (1973).
[36] City's Dispositive Motion at 15.

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ORDER

Case No. 13-3-0007 is **dismissed.**

DATED this 30th day of September, 2013.

Cheryl Pflug, Board Member

Margaret Pageler, Board Member

Charles Mosher, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[37]

[37] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), -840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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